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No. 98-863

In the Supreme Court of the United States

OCTOBER TERM, 1998

LAFAYETTE PLACE ASSOCIATES,
PETITIONER,

v.

CITY OF BOSTON,
RESPONDENT.

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court Of Massachusetts

REPLY TO BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. Procedural History 1

B. Factual History 2

1. *The Tripartite Agreement* 2

2. *The BRA's Design Review Process* . . 2

3. *The Campeau Lease* 2

4. *The Expiration of LPA's Rights Under The Tripartite Agreement* 3

REASONS FOR GRANTING CERTIORARI 4

A. LPA Timely Raised Its Federal Constitutional Claims And Presented Them Adequately To The SJC 5

B. The Supreme Court Has Jurisdiction Because LPA Raised Valid Federal Constitutional Claims 8

1. *The SJC's Decision Constituted A Sharp Break With Prior Doctrine* 8

2. *The SJC's Decision Constitutes A Taking* 9

3. The SJC's Decision Violates Due Process *10*

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Chicago, Burlington and Quincy RR. Co. v. Chicago, 166 U.S. 226 (1897) 1

Cole v. Arkansas, 333 U.S. 196 (1948) 5

Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988) 6

Great Northern R. Co. v. Sunburst Oil Ref. Co., 287 U.S. 358 (1930) 5

Herndon v. Georgia, 295 U.S. 441 (1935) 5

Hughes v. Washington, 389 U.S. 290 9

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) 6

Piard v. Connor, 404 U.S. 270 (1971) 5

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 6

San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981) 2

Taylor v. Kentucky, 436 U.S. 478 (1978) 6

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 6

STATE CASES

Hastings Assoc., Inc. v. Local 369 Bldg. Fund, Inc., 42 Mass. App. Ct. 162 (1997) 8

Lafayette Place Assoc. v. Boston Redevelopment Auth., 427 Mass. 509 (1998) 8

Leigh v. Rule, 331 Mass. 664 (1954) 7

MASSACHUSETTS APPELLATE RULES

Mass. R. App. P. 27(b) 1

STATEMENT OF THE CASE

A. Procedural History

The City mischaracterizes LPA's petition for rehearing, asserting that LPA "did not cite to the Takings Clause of the Fifth Amendment . . . or claim . . ., that the [SJC] has 'sharply' broken with state common law." Opp. 2. LPA did not cite to the Fifth Amendment because it has no direct Fifth Amendment claim against a *State* entity and could only make the Takings contention through the incorporation of that clause by the Fourteenth Amendment's Due Process Clause. *Chicago, Burlington and Quincy RR. Co. v. Chicago*, 166 U.S. 226, 232-34 (1897). LPA did, however, argue that "the [SJC], by virtue of its decision, *took LPA's property interest* in the Hayward Parcel . . ., and *gave it to the City*." App. 13-14[1] (emphasis added).

Furthermore, LPA made all the arguments in its rehearing petition it relied on in its petition for writ of certiorari. App. 6-7 (the requirements for tender broke with prior precedent); 8-10 (the SJC ignored established standards for excuse of performance); 17-20 (the heightened standard for individuals dealing with government violated settled principles).[2]

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[1] The abbreviation "App." refers to the appendix filed with LPA's original petition. "SA" refers to the supplemental appendix, attached.

[2] The City castigates LPA for spending only one paragraph of its "*twenty-one page*" petition for rehearing on the federal issues. Opp. 2, 10. Yet LPA's petition was strictly limited to *ten pages* by Mass. R. App. P. 27(b). LPA used all ten pages permitted to argue the many errors it believed the SJC had made. Much of the petition concerned the sharp changes in State law which are integral to LPA's federal claims. App. 6-10, 17-20. Given space limitations, LPA could not repeat all these arguments in the federal section.

B. Factual History

1. *The Tripartite Agreement*

The Tripartite Agreement did leave some details open; however, most of these were to be resolved initially by the City and were arbitrable only if LPA disagreed. For example, the City was required to obtain the appraisals for parcels D-3 and D-4 but admittedly never did. Since no disagreement over the appraisals ever occurred, there was no basis to invoke arbitration.

2. *The BRA's Design Review Process*

The City notably avoids any mention of the numerous regulatory roadblocks to which the BRA subjected LPA or of the City's own candid public and private expressions of intent not to abide by the Tripartite Agreement. Pet. 5-7; App. 74; SA § A; *cf. San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 655 n. 22 (1981) (Brennan, J. dissenting). Despite these efforts, LPA completed the first stage of the design review process. *Compare* Opp. 4 *to* SA § B.

3. *The Campeau Lease*

The City seeks to shift the Court's focus by emphasizing LPA's lease and its lack of involvement in pursuing the acquisition after October 1987.[3] This requires the City to ignore trial testimony which showed that LPA agreed to the lease only because of stonewalling by the City

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[3] The City strikingly omits any reference to LPA's proposed sale to Campeau during the claimed period of inaction in late 1987/early 1988 when LPA was dealing regularly with the BRA. The BRA sought to use its approval authority over the project transfer to leverage substantially more money for the City from the sale. SA § E (BRA Director told LPA that he would not approve the sale "until I get a higher value for the [Parcel].").

and that the lease was not profitable for LPA. SA § C. LPA could not pursue the acquisition itself after the March 1988 lease because its rights had been delegated to Campeau. Campeau, however, pursued the acquisition diligently throughout 1988, right up to its December 1988 offer to purchase the property "immediately." App. 87. LPA retained a strong interest in the acquisition; it was due $5,000,000 if Campeau acquired the property.

While the City faults LPA for its alleged inaction before the lease, the City necessarily glosses over the numerous meetings and discussions LPA had with City and BRA officials in an effort to conclude the acquisition. SA § D. The City also omits that its failure even to define the final boundaries of the property or obtain the needed appraisals, despite numerous requests by LPA, effectively precluded LPA from the very actions the City now argues were required.

4. *The Expiration of LPA's Rights Under the Agreement*

The City repeatedly faults LPA and Campeau for an alleged lack of detail in the December 1988 Campeau letter.[4] The City, however, declines to acknowledge that its own actions precluded Campeau from sending a more detailed letter. Moreover, the City did not respond in good faith to the letter, waiting to reply until the eve of the drop dead date.[5]

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[4] The Campeau letter of December 30, 1988, now cited by the City, was excluded at trial. In any event, the letter was at most an effort by Campeau to appease the BRA, which held absolute power of approval over Campeau's huge proposed redevelopment.

[5] As to the clearly erroneous conclusion by the SJC, now eagerly embraced by the City, that the Campeau letter was sent to the "wrong party," the City, not the BRA, owned the Hayward Parcel. Moreover, since the jury found that the BRA did not act as the City's agent, sending the letter to the BRA would not have been appropriate. App. 7 n.4.

REASONS FOR GRANTING CERTIORARI

LPA's petition for writ of certiorari presents a viable and significant federal constitutional claim. The City misstates LPA's position, reframing it as the oft-rejected claim that a change in State common law can present a federal constitutional issue. LPA argues rather that the confluence of a sharp retroactive break in State common law with a resulting direct benefit to the State at the expense of a private party can constitute a constitutionally cognizable claim. Nowhere in the City's Opposition does it even acknowledge that LPA's argument requires direct benefit to the State.

Since the principal aim of the Fourteenth Amendment is to protect individuals from the arbitrary exercise of State power, this tenet of LPA's argument is of central importance. As LPA argued, the exercise of State power for the benefit of the State requires enhanced federal scrutiny. Pet. 21, 25-27.

Moreover, the City's contention that this case is fact specific and lacks any general importance is wrong. The broad constitutional question LPA asks this Court to consider — whether a sharp change in common law made by a State court for the economic benefit of that State (or subdivision thereof) is constitutional — is a question never before answered by this Court, and is apt to recur.

A. LPA Timely Raised Its Federal Constitutional Claims And Presented Them Adequately To The SJC.

The City advances two flawed arguments to convince this Court that it lacks jurisdiction. The City's primary contention is that LPA raised its federal claims too late, and that they are unreviewable in any event because the SJC did not explicitly address them.[6] Such an assertion contradicts

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[6] In none of the cases the City cites, however, was the petition for rehearing genuinely the first opportunity to raise the federal claim.

this Court's precedents: "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity to raise it." *Herndon v. Georgia*, 295 U.S. 441, 444 (1935); *see, e.g., Cole v. Arkansas*, 333 U.S. 196, 200 (1948); *Great Northern R. Co. v. Sunburst Oil Ref. Co.*, 287 U.S. 358, 366-67 (1930). These cases hold that jurisdiction is proper even if the petition for rehearing is summarily denied without reference to the federal claims.

LPA argued at length in its petition that the SJC's decision was a surprising departure from precedent on several grounds. The City effectively concedes, Opp. 18, that it did not make the arguments adopted by the SJC — undoubtedly because it, like LPA, thought they were foreclosed by existing precedent. Thus, this case represents the classic instance in which first raising an argument in a petition for rehearing is not only appropriate but necessary.

The City also criticizes LPA for the way in which it presented its constitutional claims, and even asserts that LPA's petition for rehearing is inconsistent with its petition for a writ of certiorari.[7] LPA devoted a separate section of its petition for rehearing to the federal issues.[8] In the heading

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[7] This assertion of inconsistency is particularly baffling since, in its petition for rehearing, LPA asserted both the arguments set out in its petition for writ of certiorari, and repeatedly urged that the SJC's decision departed from clear precedent. There is no basis for the City's claim that LPA alleged only that the SJC conducted inappropriate fact-finding and misapplied those facts to existing law. App. 6-10, 17-20.

[8] The City correctly notes that this section of LPA's rehearing petition (like the other sections) was brief, but this Court has never required any more than enough to give the State court an "opportunity to correct [the] constitutional violation." *Piard v. Connor*, 404 U.S. 270, 275 (1971). LPA's brevity was required given the ten page limit. The case involved a complex commercial transaction spanning a decade, and the SJC's forty-one page opinion contained numerous issues which LPA needed

of this section, LPA cited the Due Process Clause of the Fourteenth Amendment, the provision under which it seeks a writ of certiorari. Furthermore, the petition noted both the ordinary due process claim LPA was making by referring to the SJC's "arbitrary and capricious" actions, and the Takings claim by noting that the SJC's decision "took LPA's property interest in the Hayward Parcel . . ., and gave it to the City." *Contrast Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

Because LPA clearly identified the constitutional provisions in question, the City's complaint can only be premised on the limited claim that LPA did not reargue the sharp break in State law in the federal claim section of its petition for rehearing. Yet LPA in fact noted specifically that the SJC "overlooked settled law" and made the same arguments at length on the sharp break in State law in asking the SJC to reconsider its decision based on errors in State law. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) ("No particular form of words or phrases is essential. . . . [I]f the record as a whole shows either expressly or by clear intendment [that the claim was brought to the attention of the State court], the claim is to be regarded as adequately presented."). LPA's presentation of these issues is consistent with this degree of specificity. *See, e.g., Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978); *cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980).

B. <u>The Supreme Court Has Jurisdiction Because LPA Has Raised Valid Federal Constitutional Claims</u>.

LPA has limited its claim to those cases where a State court judgment represents a sharp and unexpected break with existing precedent *and* the State itself (or subdivision

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to address.

thereof) directly benefit as a result. LPA does not dispute that State common law judgments are ordinarily not reviewable, and LPA has not asserted that "startling" State court judgments are reviewable. If LPA's constitutional claims are valid, jurisdiction follows as a matter of course.

1. *The SJC's Decision Constituted a Sharp Break with Prior Doctrine.*

The City utterly failed to show that any of the three changes LPA identified the SJC as making in State law were grounded in prior precedent. First, the City mischaracterizes LPA's position that the Campeau letter would have been a sufficient offer of performance under Massachusetts law. The City offers a page long string cite to demonstrate that a party must be ready, willing, and able to perform to recover in contract. Opp. 19-20. But LPA never argued otherwise. Rather, LPA argued that, under existing Massachusetts law articulated in *Leigh v. Rule*, 331 Mass. 664, 668 (1954), the jury was justified in concluding that LPA and Campeau fulfilled their obligations and were ready, willing, and able to perform. App. 69-70. The City conspiciously failed to offer a single prior decision in which anything more than the *Leigh* rule of "some offer of performance" was required.[9] *Id.*[10]

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[9] Not only did the City fail to make the argument with the "concise eloquence" of Justice Fried, Opp. 18, it never made the argument at all, much less cited any of the cases upon which it now relies. Pet. 13.

[10] The City argues fawningly that the SJC's opinion "could come straight from the pages of a treatise explicating Massachusetts law of contracts," Opp. 18, but notably cites not a single case or treatise with which the opinion is consistent.

Second, the City simply and conveniently ignores LPA's argument that the SJC raised the bar for excusing non-performance where performance would be futile.[11] Pet. 14.

Third, as to LPA's argument that the SJC violated settled principles of State law by holding LPA to higher standards because it contracted with the government, the City's response is wrong because it plainly misconstrues the SJC's opinion. The opinion makes clear that a private entity such as LPA "must be particularly assiduous" when dealing with the government. *Lafayette Place Assoc. v. Boston Redevelopment Auth.*, 427 Mass. 509, 523-24 (1998) ("Men must turn square corners when they deal with the Government"). The obvious conclusion is that LPA had a higher standard to meet in seeking to recover against the City than it would face in dealing with a private entity. The City's claim that the SJC means only that any "party to a contract, whether it is a government or not, must comply with the precise terms of the agreement" is a transparent linguistic slight of hand. Finally, the City utterly gives away its point by asserting that LPA "cannot argue seriously that this principle is inconsistent with Massachusetts precedent," Opp. 20, while failing either to cite a single case supporting the SJC's position or to address any of the conflicting cases cited by LPA. *Compare* Opp. 20 *with* Pet. 15-16.

2. *The SJC's Decision Constitutes A Taking*

The City's Opposition fails to address meaningfully LPA's principal constitutional argument. The City simply ignores a central tenet of LPA's argument — that the benefits

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[11] While the City tediously reiterates that LPA never triggered the contract's arbitration procedures, it never addresses LPA's argument that, under existing Massachusetts law, LPA would have been entitled to have the jury determine whether it was excused from submitting its claims to arbitration because to do so would have been futile. Pet. 14; *see Hastings Assoc., Inc. v. Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 171 (1997).

of the sharp change in law must inure directly to the government. Not once does the City acknowledge this central aspect of LPA's argument, much less address whether the requirement of a direct benefit to the government meaningfully distinguishes this case from the long list of cases the City cites.[12] Notably none of those decisions address a case, as here, where there is both a sharp change in the law and a resulting direct benefit to the State.[13]

3. *The SJC's Decision Violates Due Process*

The property interest asserted by LPA is the long established, protected property right in contract. Pet. 16. The City's assertion that LPA's petition relies on a vested property interest in the jury verdict is untrue, Opp. 26-27, and the City's conclusion that accepting LPA's argument would subject every jury verdict to constitutional scrutiny is therefore disingenuous.

The City's claim that LPA failed to raise due process concerns is as flawed as it arguments against LPA's Takings claim and for the same reason: the City conveniently leaves out half the argument. Absent the resulting $20,000,000

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[12] The City's effort (Opp. note 8) to discredit LPA's reliance on Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 294 (1967), is ineffective. The City's first argument fails again to recognize the distinction recognized by Justice Stewart and relied upon here by LPA - that the constitutional question is stronger when the benefit inures to the government. The City's second argument does not challenge the point at all, but merely reiterates its claim that there was no sharp break here.

[13] The City's failure to confront one of the key limiting principles in LPA's argument opens the door for it to trot out the hackneyed tautologies that granting the writ would open a "Pandora's Box" and that "petitions for writ of certiorari would escalate sharply." Opp. 24. The cases in which both a sharp break and a substantial economic benefit to the State occur would be few and would hardly result in a landslide of new petitions for writ of certiorari. *See* Pet. 11 n.9.

economic benefit to the City, LPA might well have no claim, but that is not LPA's contention. LPA respectfully suggests that an evaluation of its whole argument will lead the Court to find a viable and important constitutional claim.[14]

CONCLUSION

For the foregoing reasons and for those cited in LPA's petition for writ of certiorari, LPA respectfully requests that the Court grant a writ of certiorari.

Respectfully submitted,

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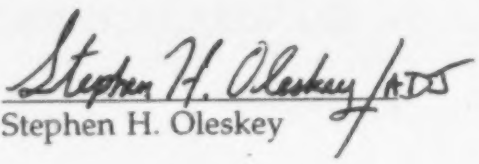
[14] Although the adjectives "self-interested," "unfounded," and "unprincipled" to which the City refers, Opp. 28, do appear in LPA's petition, LPA never asserted that the justices of the SJC had any personal self-interest as the City now implies. Likewise, the term "unprincipled" appears but once and is not used in reference to the SJC's opinion.

CERTIFICATE OF SERVICE

Stephen H. Oleskey hereby certifies under the pains and penalties of perjury that he caused a true copy of the Lafayette Place Associates' Reply to Respondent's Brief in Opposition to be served on February 4, 1999 by mail upon Rory Fitzpatrick, Esq., Kirkpatrick & Lockhart LLP, One International Place, Boston, MA 02110-2637, special counsel for the City of Boston.



Stephen H. Oleskey

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

Page

Section A (Trial Testimony of Mr. Coyle; Letter of Mr. Coyle; Trial Testimony of Mr. Ransen) 2

Section B (Trial Testimony of Ms. Allen) 7

Section C (Trial Testimony of Mr. Ransen) 9

Section D (Trial Testimony of Ms. Allen) 11

Section E (Trial Testimony of Mr. Ransen) 13

Section A

Trial Testimony of Mr. Coyle, BRA Director

Q Is that the proposal by Commissioner DiMenno to put a new street down the middle of the Hayward parcel?

A Yes. I think I said earlier that this was on the table for some time.

. . .

Q That was Mr. Shou?

A Yes. That you can't put a road with 40-foot dimensions or 50-foot dimensions through the middle, going diagonally, across a development site and still build. And the reference was, what was the standard floor plate for downtown development of that generation of buildings. And they tended to be between twenty and twenty-five thousand gross square feet. But it's also clear to me that they do not seem to understand that the building has pertinent uses as well as just its walls coming down on terra firma.

. . .

Q Do you recall anything further about the discussion as related to the construction of phase two on the Hayward parcel?

A Yes. We talked about the slowness of the system and why he was stalling. And he said to me that the option price was too cheap. That in 1978 – we came in there. I was a bad area, and the Combat Zone was rampant. He'd like to change the deal now to reflect the values in 1987.

Letter from Mr. Coyle to LPA

Boston
Redevelopment
Authority

Raymond L. Flynn
Mayor

Stephen Coyle
Director

One City Hall Square
Boston MA 02201
617-322-4300

April 22, 1987

Mr. Marco T. Ottieri
Lafayette Place Associates
1 Avenue de Lafayette
Boston, MA 02111

Dear Mr. Ottieri:

As part of the Boston Redevelopment Authority's review of the Lafayette Place II development, the Authority requires the submission and approval of a meeting with BRA staff. This impact report shall incorporate the Transportation Access Plan which is required by the City of Boston.

The studies which are required for your proposal are listed in the attached Scope of the Environmental Impact Assessment, which includes the format of the EIA and a description of the environmental issues to be addressed.

Prior to presentation of your proposal to the BRA Board, the environmental studies will be distributed to public agencies

and interested groups and individuals for a 30-day public review period. Prior to the Authority's approval of your project, the environmental studies and any necessary mitigation measures must meet with Authority approval.

Please work with my staff in coordinating the content and timing of the environmental report with the ongoing design review process.

As you formulate your plans for Lafayette Place II, the project should be analyzed based on the heights and massing controls outlined in the proposed Downtown Interim Planning Overlay District amendment to the Zoning Code. The restrictions specified for the Hayward Place limit project height to 125-155 feet and FAR 8-10. Once established, IPOD controls will apply to downtown projects, including Chapter 121A projects, for two years.

I look forward to continuing our cooperative review with you during the coming months.

Sincerely,

s/Stephen Coyle

Stephen Coyle
Director

Trial Testimony of Mr. Ransen, LPA's Principal

Q. (By Mr. Oleskey) Mr. Ransen, when you learned from Mr. Ottieri that Mr. Coyle had sent a letter to him on April 22nd indicating that because of the IPOD the building that you were planning to build should be at 125 feet, were you surprised?

A. Yes.

Q. Why?

A. Because I had met with him before that, and we had agreed on an envelope and a size for the project.

Section B

Trial Testimony of Ms. Allen, BRA's Asst. Dir. of Urban Design

Q So, we can agree that this project was at least in Stage II, can we not?

A Yes.

Section C

Trial Testimony of Mr. Ransen, LPA's Principal

Q. The question is, Mr. Ransen: Why did you decide to sell these interests to Mr. Campeau and his companies at this time?

A. Well, when the project was built, it only had one department store, and it wasn't successful. And we had always planned to get the second department store on the Hayward Place site. After these years of having problems getting it approved, we thought we couldn't get this site for the second department store.

Campeau was a much bigger developer with much bigger resources, and he owned Bloomingdale's. It was a lot easier for him to get the department store there than we could. And since we weren't doing well with Mr. Coyle, we thought because it's Jordan Marsh, they would have a lot more trump to do well.

It was very important for us as a developer to see that project completed. We didn't want it to become a failure; we wanted it to be a good project for downtown Boston, and so we needed the department store there. The only way to get it was to have Campeau do it.

. . .

Q. Was the Campeau sale a profitable one for you?

A. No.

. . .

Q. How much [did LPA receive under the lease with Campeau]?

A. We received less than we got on the sale. We received $12 million plus a note.

Section D

Trial Testimony of Ms. Allen, BRA's Asst. Dir. of Urban Design

Q What do you recall is being at meetings with the developer in 1986 and in 1987 until you left, where there were discussions about detailed issues concerning the Lafayette Place Associates proposal, isn't that right?

A I do recall some meetings with the developer. I do not recall what years those were when I attended those.

Section E

Trial Testimony of Mr. Ransen, LPA's Principal

Q. What did Mr. Coyle say to you at that meeting?

A. Well, I discussed with him the problem of getting the transfer made. I explained to him, as I explained to the jury, that we should all agree in essence to get the project completed so it's successful. It was really the spark plug for the entire area around the combat zone, and I tried to impress him that he should have the approval made quickly, expedited, to get Campeau in there and start doing the building.

Q. What did Mr. Coyle say?

. . .

A. Mr. Coyle said, "No, not until I get a higher value for the land. And I don't want you to take all that profit and run back to Canada with it."